

WRITTEN BY RICHARD MOYES

A PERSPECTIVE ON PROTECTING CIVILIANS

WWW.ARTICLE36.ORGINFO@ARTICLE36.ORG[@ARTICLE36](https://twitter.com/ARTICLE36)

Article 36 is a specialist non-profit organisation, focused on reducing harm from weapons.

Since Article 36 was established, ten years ago, much of the organisation's work has been framed around a concept of 'protecting civilians'. Our main areas of focus have been on the implications of the choice of weapons in political violence, primarily in the context of 'armed conflict'. In framing concerns around certain weapons, the experience of civilians (in particular their 'exposure' to 'harms' or 'risks of harm') has been a consistent basis for analysis and argumentation.

The term 'civilian' has a formal legal meaning within international humanitarian law as well as being a term in general language. In its legal form, civilians are people that should be afforded protections in the special circumstances of conflict; but the special circumstances of conflict are circumstances in which it is accepted that civilians might be

exposed to severe risks, including death, grave injury and long-term deprivation, without those experiences necessarily being illegal. So the law is both a source of protection and a structure that legitimates exposing people to harms that might normally be considered unacceptable.

In turning repeatedly to the concept of the civilian, and of protecting civilians, we experience also repeated patterns of negative response within the policy discourse. A common reaction to efforts to better protect civilians (by identifying and curbing specific acts considered particularly harmful) is to assert that the current structure of legal protections/risk exposures is optimal. As a result, no additional legal rule or commitment of policy is necessary, nor could it be made without undermining both the law and the vital interests of militaries.



Residents of Al Mishlab, east of Raqqa returning back home to check their houses and belongings, 2017 © Diala Ghassan / MSF

This posture is maintained through various ruses, including inter alia:

- × rejection of the issue of concern, including
 - rebuffing evidence whilst gathering and presenting no alternative evidence;
 - denying the relevance of patterns of actual harm over time in favour of case-based atemporal hypotheticals.
- × reframing issues of concern in relation to existing law
 - asserting (contrary to/regardless of evidence) that all harms arise from legal violations, therefore demanding further efforts to secure legal ‘compliance’ as the only solution;
 - demanding that policy positions on emerging concerns can only be expressed in legal terms and then insisting that things expressed using legal terms must only repeat existing law;
 - ‘discovering’ within the course of debates about what should be done, and as if through extensive analysis of the issue, that ‘international humanitarian law applies’ - thus making the most obvious point of departure appear like the achievement of an important conclusion.
- × finding any proposed responses to be impossible or ill-advised
 - arguing that any constraint on military choices of action gives a decisive advantage to adversaries;
 - refusing to acknowledge that there is a space for policy commitments that can be flexibly implemented;
 - claiming that anything adopted as political policy amounts de facto to a legal obligation;
 - arguing that additional legal rules promote bad-faith exploitation by adversaries and that rules actually promote rule-breaking.

Over time such practices have shifted international humanitarian law in the mindset of some diplomatic practitioners, from being the mandatory baseline of civilian protection applicable in even the most desperate military circumstances, to being treated as a sort of ‘gold standard’. As a result of this deliberate disorientation, people come to mistake the floor for the ceiling.

Such rhetorical practices reveal the law in one of its fundamental roles: as a shield against asking meaningful questions about the policies and practices of violence. Such a role is maintained not through quality of argumentation, but simply through repetition of national positions

dominated by defence ministry interests (or anxieties). This is one of international humanitarian law’s most active manifestations, yet this mode of legal argument (if it can be called that) is not in the interests of civilians or geared to questioning what it should mean to consider their interests. Ensuring uses of force are in-line with the letter and spirit of relevant national and international laws, codes and standards is an important part of protecting civilians, but so too is the willingness to recognise how such laws, codes and standards need to be improved.

It is a mode of legalism that seeks to reduce everything into a narrowly understood categories. Not only does it work actively and systematically to prevent space for the adoption of legal and non-legal responses beyond existing legal rules, but it also seeks to deny any space for recognising that people have valid interests that go beyond the baseline protections afforded to them as civilians under the law.

The principle of ‘humanity’ in the law is at best recognised as generating lines at which the pursuit of military interests must yield (though too often it is treated as endlessly malleable). It is a recognition that certain things might be unacceptable – but it is not an active driver towards people’s interests. It invites arguments around where the utterly intolerable should be understood to lie, rather than what the minimum achievable disruption of people’s best interests might be.

In the manner in which states and others act, the law then provides no principle or point of reference that can pull the protection of civilians towards something positive, rather than just away from something abhorrent.

This is not a criticism of international humanitarian law on its own terms - after all international humanitarian law does not claim to offer civilians more than an amelioration of war’s worst sufferings. But it is perhaps a starting point from which to organise, over time, a structural rejection of a mode of discourse that has become prevalent, but which is morally corrosive.

Rather than reducing people’s interests to only a set of minimum protections, the term ‘civilian’ could also be put to work, in this discursive space, towards people’s wider and fuller personal and social interests. To frame our agenda in open, positive terms: what could constitute the ‘full protection’ of civilians?

AN ADDITIONAL POINT OF REFERENCE

As we noted above, the principle of humanity in international law is commonly framed as demanding limits against the brutality that might occur if 'military necessity' is left unchecked. The concept of 'necessity' is an appeal to special circumstances – it is an assertion that abstract political interests are going to intrude upon people's normal expectations of life, that certain norms and standards will be broken. Significantly, military necessity is driving towards a point – typically the attainment, maintenance or restoration of a political entity's ability to act as they choose in a social or physical space. It has a goal that pulls action towards it.

This can call to mind constructions of perspective in art and technical drawing – with military necessity functioning as a vanishing point, towards which lines will converge if they are allowed to continue, uninterrupted. Our notion of the 'full protection' of civilians can be imagined similarly: not as a concrete state but as an abstract point towards which there can be continuous movement and convergence. Certain milestones or indicators can still be suggested, as markers along the way, but these should not be mistaken for the point itself.

For example, it might be tempting to suggest that the full protection of civilians would be equivalent to a state in which people can fully enjoy their human rights. But human rights, again, are a form of minimum standard, through which our lines of perspective must pass but still continue on their way. Alternatively, we might frame our aspirations in relation to the state in which people were living prior to conflict. Such a state could be offering people more or less than the full enjoyment of their human rights, depending on their local conditions. Such an approach has a practicality as a source of indicators, but again falls far short of the abstract goal that our concept represents. The full protection of civilians should be understood as aspirational state towards which we can be progressively striving, but never reaching.

This additional 'vanishing point' will allow us then to find alternative perspectives on conflict policy. Rather than being trapped within the prevalent structures, it provides an opportunity to see the landscape differently and from that to find new opportunities to shape societal expectations more ambitiously towards protection. Without this point of perspective being active in the discourse, the shift to the

special circumstances of conflict can lead us to accept too much harm as normal or inevitable. The additional point of orientation draws us always away from the acceptance of harm, towards its full prevention and avoidance.

For example, part of the normalisation of harm comes from a tendency to limit the harm that is recognised as significant (or tractable) to only the most direct and immediate consequences of specific weapon use. For example:

- × direct deaths and physical injuries to civilians caught in the blast and fragmentation radii of a cluster munition strike may be acknowledged as harms; but
- × mental health harms to those in the area of that same strike might be assumed to fall short of the threshold of significance; or elsewhere
- × a pattern, over time, of increased cancer in an area where bombing caused the release of certain toxic chemicals might be considered too causally diffuse; or
- × lost employment opportunities as a result of disruption to education may be too abstract.

Attention to the full protection of civilians can be used to recognise such patterns of harm as a falling short of our goal. We don't need to prove the causality of the specific pattern, or to fully quantify the severity of harm, but we can anyway suggest precautionary orientations and practices that might make such causation less likely in the future.

Such precautionary orientations, in turn, can invite the introduction of alternative temporal elements. International humanitarian law's 'case-by-case' structure of rule application tends to privilege the specific moment of certain individual's decisions (such as 'commanders'), keeping each such moment distinct and disconnected from the moments around it. There is no suggestion that the sum of these moments might have a significance beyond what can be seen when they are treated in isolation.

Yet in reality, and in policy making, it is possible to organise around different units of time. For example, a *military policy* to work to avoid using explosive weapons with wide area effects in populated areas could be given effect, in part, through command reviews of weapon use during the preceding week: with decisions to use certain weapons subject to subsequent scrutiny, review and additional analysis. Additionally, such a policy could be given effect prior to possible moments of weapon use, by considering the weapon capabilities deployed to a particular area in

order to try to ensure alternative options are available. Such approaches could bear against the use of say, artillery, in an urban area whilst not wholly removing that option in specific moments.

The full protection of civilians should invite us to see as significant the widest and most diffuse harmful effects of conflict and so to seek some justification and accountability for every concession that is made towards accepting harm – even if such responses are at times little more than an acknowledgement that the harm is there. The full protection of civilians should promote methodologies and standards that are accepted in contexts of public health regarding evidence, transparency and argumentative rigour, and to promote also a plurality of analytical approaches; recognising that harms are not only experienced medically, but also in patterns of social and economic disempowerment and exclusion.

As a macro-level, long-term, political strategy this approach can be developed initially by building the phrase ‘full protection of civilians’ as a signifier within the international policy discourse. Commitment can be expressed to the full protection of civilians, and the meaning of such a commitment can be sketched out by promoting recognition that broad and diffuse harms are important and warrant consideration.

CONCLUSION

The concept of protecting civilians is the product of a political philosophy that sees violence organised by political entities as a contestation between those abstract entities and their representatives, not between ‘peoples’. Civilians are those people not participating in that contestation and are so neither the agents nor the proper targets of it. It is founded upon a recognition that political entities are not automatically *the same* as the people with whom those entities are spatially co-located or over whom those political entities claim some authority or exert some control.

This political philosophy is not a given. Even before we get to legal specifications, the concept of the ‘civilian,’ as we know it in this space, is not a ‘fact’ but is contingent upon, and an expression of, this sort of underpinning political philosophical structure. At an overarching level, protecting civilians implies preserving and maintaining a political philosophy within which violence may be organised (by certain entities under certain conditions), but must try to stay within certain limits.

The nation state is currently the primary unit for the authorised organisation of violence in the world. It is nation states that are considered appropriately empowered to agree the rules of international law that label people as ‘civilians’ and to stipulate the protections that they are supposed to be afforded. Yet if the concept of protecting civilians is founded on some separation of ‘peoples’ from the political units of violence then we need to give some agency to peoples separate from those political units; agency to articulate and define their interests on their own terms. Currently the concept of protecting civilians is sold short by the deference that many states show to the ambitions or anxieties of their defence ministries, and it is sold short again because ‘progressive’ critiques present only a disconnected agenda of incrementalist policy goals.

We need to be careful when those who have the power to kill people also have the power to apply the labels. The term ‘full protection of civilians’ can serve as an initial organising tool for a long-term strategy to challenge that co-location of power in the current international discourse around policy, law and conflict.